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4-637

In The

Supreme Court of the United States

October Term, 1941.

No. 157

BERNICE VINCE,

Petitioner,

-

GREAT NORTHERN LIFE INSURANCE COMPANY,
a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No

BERNICE VINCE,

Petitioner,

v.

GREAT NORTHERN LIFE INSURANCE COMPANY, a Corporation.

PETITION FOR CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Bernice Vince, by her counsel, Arthur J. Abbott, alleges:

A. Statement Of Matter Involved.

1. Decision Appealed From.

The instant petition seeks to review the decision of the Circuit Court of Appeals for the Sixth Circuit which

reversed the District Court for the Eastern District of Michigan, Southern Division, and directed the entry of a decree adjudging a policy of insurance to be null and void.

2. Issuance Of Policy and Denial Of Claim.

Under date of April 29, 1937, the Great Northern Life Insurance Company (hereinafter referred to as the "Company") issued a policy of life insurance in the sum of six thousand dollars to William A. Vince, with your petitioner, wife of the insured, as beneficiary (R. 7). The insured died on March 4, 1938, and due proofs were submitted and claim made (R. 8).

On April 28, 1938, the company denied the claim on the basis that the application was false in not disclosing disorders of respiratory system (pneumonia) which the insured had had in 1926-27 and 1931-32 (R. 179).

3. Suit By Company Under Declaratory Judgment Act.

On May 2, 1938, the company brought suit in the District Court under the Federal Declaratory Act of June 14, 1934 (28 J. S. C. A. 400) to have said policy adjudged to be null and void (R. 2-10). After answering, your petitioner filed a cross-claim for the amount due under the policy (R. 16-18) and made a written request for a trial by jury (R. 24).

4. Although Parties Reversed, Issues Were Tried As At Law By the Court and Jury.

The cause came on to be heard before the Honorable Frank A. Picard on September 12, 1939, and, although the parties were reversed in their position before the court, the issues were tried as at law by the court and jury. The jury rendered a verdict in favor of your petitioner and against the company (R. 26-27). Subsequently the company filed a petition for a judgment notwithstanding the verdict and judgment, or in the alternative for a new trial, which the court denied (R. 29).

5. Facts Submitted To Court and Jury.

It was shown by evidence submitted at the trial of the cause that:

(a) ACCORDING TO ADMISSION OF CHIEF UNDERWRITER, COMPANY WOULD HAVE ACCEPTED RISK IF ILLNESS COMPLAINED OF HAD BEEN DISCLOSED IN APPLICATION.

The chief underwriter of the company testified as to his extensive knowledge and experience in such capacity and the uniformity of underwriting practices. When it was pointed out that several other old line companies had accepted the risk in question with a full disclosure of the illnesses complained of (R. 99, 126, 129), he admitted his company would have accepted the risk if the illnesses had been disclosed (R. 177-178).

(b) AT THE TIME THE CHIEF UNDER-

WRITER OF THE COMPANY PASSED UPON THE APPLICATION, HE KNEW THE INSURED HAD HAD PNEUMONIA ALTHOUGH IT WAS NOT DISCLOSED IN APPLICATION.

The chief underwriter of the company passed upon the application (R. 66). At the time the application was considered there was placed on a data sheet forming a part of the file a coded notation "4-29-N" which the witness deciphered as meaning that the insured "had pneumonie within the year; that would be between 1926 and 1927" (R. 74).

(c) ALTHOUGH THE UNDERWRITER KNEW THE APPLICATION WAS FALSE IN THE ABOVE RESPECT, HE DID NOT NOTIFY THE APPLICANT OR MAKE FURTHER INVESTIGATIONS.

The record does not show that the company notified the applicant of the above discrepancy. The underwriter did not investigate further (R. 74).

(d) THE COMPANY EXCHANGED INFORMATION WITH OTHER COMPANIES ON REPORTS OF DISORDERS OF ANY INDIVIDUAL RECEIVING A POLICY OF INSURANCE FROM ANY OLD LINE COMPANY.

The underwriter testified that the company maintained a file of information exchanged between all old line companies which included the report of any disorder to any of the companies (R. 174). Proofs submitted by your petitioner showed that the insured reported the illness

complained of to several old line companies (R. 99, 126, 129).

(e) APPLICANT INFORMED COMPANY'S MEDICAL EXAMINER OF DISORDERS COMPLAINED OF AT THE TIME OF MAKING THE APPLICATION.

A witness, Thomas G. Andris, was present at the time the company's medical examiner examined the insured. He was present because he was being examined for a similar policy (R. 88). The medical examiner filled in the answers to the questions contained in the application (R. 132, 89). He wrote some of the answers at the time of questioning the applicant orally and others later (R. 89-90). The witness testified the applicant answered all of the questions correctly and informed the medical examiner that he had had pneumonia (R. 90).

(f) THE PREVIOUS ILLNESSES OF THE INSURED DID NOT CONTRIBUTE TO HIS DEATH.

Expert medical testimony showed that the previous illnesses of the insured did not contribute to his death (R. 115), and that there is no connection between attacks of pneumonia (R. 117). The company's medical examiner made a physical examination of insured and found him in good health (R. 68-69).

6. Circuit Court Of Appeals Ruled Petitioner Not Entitled To a Jury Trial On All Issues.

The Circuit Court of Appeals ruled that only the issues raised by the counterclaim should have been submitted

to the jury and then only in the form of special interrogatories for the guidance of the court in the adjudication of the declaratory relief prayed for, and thus definitely denied the right of a trial by jury on all of the material issues involved.

7. Circuit Court Of Appeals Held the Falsity Of Representations As Shown On Face Of Application Was Sufficient, As a Matter Of Law, To Void the Policy Regardless Of the Other Facts Which Were Submitted As Set Forth Above.

The Circuit Court of Appeals brushed aside the issues of fact raised by your petitioner and held the showing that the statements set forth in the application were false was sufficient to void the policy as a matter of law.

B. Reasons For Granting Certiorari.

1. Right Of Petitioner To Trial By Jury As At Law Was Denied.

The decision of the Circuit Court of Appeals, to-wit:

> "* * * the relief prayed in the counterclaim presents triable issues of fact in the decision of which the defendant was entitled to the verdict of a jury, though such issues should have been submitted upon special interrogatories for the guidance of the court in adjudication of the declaratory relief prayed (cancellation of policy)," * * *

is in conflict with the applicable decisions of this court and the leading decision of the Circuit Court of Appeals

for the Ninth Circuit, which has been adopted by other circuits. This court has held repeatedly that the defense of fraud in the inducement of an insurance policy is available in an action at law and the issue cannot be taken from a jury. The leading case decided by the Circuit Court of Appeals for the Ninth Circuit holds that cases such as the instant cause brought under the Declaratory Judgment Act should be tried by a court and jury as at law.

2. Decision Of Circuit Court Of Appeals For the Sixth Circuit Is Not Uniform With Decisions Of Other Circuit Courts Of Appeal On Right To Jury Trial Under Declaratory Judgment Act.

The opinion of the Circuit Court of Appeals made reference to *Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446 (C. C. A. 9)*, by saying, to-wit:

> "* * *, the opinion pointed out that the trial court was of the view that some issues of fact were essentially equitable in nature, and others essentially legal, and disposed of them accordingly. THIS COURSE WAS NOT DISAPPROVED."

Contrary to this statement, the method of trial by the District Court in the above cited case was emphatically disapproved, the court holding there was an absolute right to a jury trial under the Declaratory Judgment Act in cases such as the instant cause and that the factual issues should not have been tried piecemeal but that the entire case should have been submitted to the jury. This rule has been adopted in other circuits.

3. Circuit Court Of Appeals Apparently Reviewed Case As a Proceeding In Equity.

The opinion of the Circuit Court of Appeals is confusing in that at first it acknowledged an inability to give equitable relief for the cancellation of the policy; and second contended the triable issues of fact should have been submitted to the jury on special interrogatories for the guidance of the court in an adjudication of the declaratory relief prayed for; and third that it proceeded to grant the motion for a directed verdict based only on the *prima facie* proof of the company's defense and at the same time directed the entry of a decree adjudging the policy of insurance to be null and void which is in the nature of equitable relief such as the court earlier in its opinion concluded could not be granted by it.

4. Circuit Court Of Appeals Misstated the Position Petitioner Has Maintained In the Trial and On Appeal Regarding False Statements In Application.

In attempting to dispose of the case by a review of the motion for a directed verdict, the Circuit Court of Appeals misstated the position petitioner maintained in the trial and on the appeal regarding the company's defense of false statements contained in the application. Your petitioner did rely in part on the Michigan statute on false statements in the application, claiming, contrary to the court's apparent contention, that the statute was passed for the benefit of the petitioner and not the company. But the court failed to consider the remaining issues of law raised by your petitioner except the testimony of Thomas G. Andris.

Your petitioner maintained that the statements in the application were the conclusions of the company's medical examiner (R. 11); that the insured informed the medical examiner of his previous illnesses and that the company, being bound by such knowledge, was estopped from raising the defense of false statements (R. 11, 89, 198); that the company had actual knowledge of one illness and was put on inquiry to investigate (R. 74, 150); that the company, having been put on inquiry, could have checked its own file of information exchanged between companies, which should have disclosed the insured's entire medical history (R. 99, 126, 129, 174) or should have communicated with the applicant that the underwriter admitted the company would have accepted the risk if illnesses had been disclosed in application; that the fact insured had had pneumonia did not affect the hazard assumed.

Your petitioner contends a motion for a directed verdict can be considered only in the light of all the evidence submitted and issues raised.

5. Circuit Court Of Appeals Should Have Found, From the Evidence Submitted, That the Company Did Not Rely On the Statements In the Application.

The Circuit Court of Appeals, in reviewing the merits of the case, should have found from the circumstances existing at the time the application was passed upon, that the company did not rely on the false statements contained in the application and was therefore estopped from raising the defense of false statements.

6. The Circuit Court Of Appeals Should Have Found That the Company Failed To Sustain the Burden Of Proof Placed Upon It By the Michigan Statutes.

The Michigan statutes, Section 12427 and 12444, Compiled Laws, 1929, provide that in the absence of fraud, statements in the application shall be deemed representations and that in order to bar recovery under any policy it must be shown that the false statement was made with actual intent to deceive or that it materially affected either the acceptance of the risk or the hazard assumed. The company showed that in fact the statements as set forth on the face of the application were false did not prove that there was an actual intent to deceive except as a presumption alleged to be raised by law. As against such presumption, there is actual evidence submitted that such an intent was lacking. Inasmuch as the statutes were enacted for the benefit of the insured or beneficiary, the company has a burden of showing not only that the misrepresentations were relied upon but that they materially affected either the acceptance of the risk or the hazard assumed. Evidence was submitted showing that the company did not rely upon the application and that the company, having knowledge of the falsity of the application, did not have the right to rely on the same.

The underwriter of the company admitted he knew that the application was false since his file, at the time he passed upon the application, disclosed that the insured had had a previous illness of pneumonia. Your petitioner contends that this was sufficient to put the company on inquiry to make further investigation by examining its own records or by actually contacting the ap-

plicant for an explanation. It cannot be said that the company had a right as a matter of law to ignore this discrepancy without further investigation.

7. The Circuit Court Of Appeals Should Have Found For Petitioner On Merits Of Case.

Proofs submitted in this case will show that the Circuit Court of Appeals should have found for the petitioner on the merits of the case since the defense of the company of false statements in the application were based solely on the theory of fraud.

C. RELIEF.

WHEREFORE YOUR PETITIONER RESPECTFULLY PRAYS that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals, for the Sixth Circuit commanding that court to certify and send to this court for its review their determination on a day set to be therein designated, a full and complete transcript of the record and all proceedings of the case and that your petitioner may have such other or further relief in the premises as this court may seem just and proper and that the said decree of the Circuit Court of Appeals in the said case and every part thereof may be reversed by this honorable court.

ARTHUR J. ABBOTT,
Attorney for Petitioner.

Dated June 7th, 1941.

In The

Supreme Court of the United States

October Term, 1941.

No.

BERNICE VINCE,

Petitioner,

v.

GREAT NORTHERN LIFE INSURANCE COMPANY,
a Corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion Of Court.

The District Court rendered no opinion in the instant case. The opinion of the Circuit Court of Appeals for the Sixth Circuit has not been officially reported in *Federal (2d) Reports.* But it forms a part of the record filed herein.

II. Jurisdiction.

The decree of the Circuit Court of Appeals was entered on March 11th, 1941. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240 (a) of the Judicial Code as amended (28 U. S. C. A., Section 347). The instant petition shows that the decision of the Circuit Court of Appeals for the Sixth Circuit is not in uniformity with the decisions of the Circuit Court of Appeals for the Second, Third, Fourth and Ninth Circuits regarding the right to a jury trial under the Declaratory Judgment Act of June 14, 1934. This court has not decided this question and in the interest of uniformity has jurisdiction to review the decision complained of by certiorari (see *Baum v. Coty, 262 U. S. 159, 67 L. Ed. 922).*

III. Statement Of the Case.

The essential facts of the instant case have been stated in the foregoing petition, reference to which is prayed.

IV. Specifications Of Error.

The Circuit Court of Appeals for the Sixth Circuit erred in reversing the District Court and directing the entry of a decree adjudging the policy of insurance here involved to be null and void because:

1. Petitioner was entitled to a jury trial under the Declaratory Judgment Act in which the entire case would

be submitted to the jury for its verdict. The Circuit Court of Appeals denied this right.

2. The Circuit Court of Appeals, in denying petitioner the right to a jury trial misquoted the leading case of the *Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446 (C. C. A. 9)* and reached a decision which is in conflict with the applicable decision of this court and the decisions of the other circuits.

3. That in considering this cause the Circuit Court of Appeals apparently reviewed the case as a proceeding in equity in arriving at its conclusion.

4. The Circuit Court of Appeals misstated the position petitioner had maintained in the trial and on the appeal regarding the false statements contained in the application and failed to recognize the other defenses raised by the petitioner.

5. The Circuit Court of Appeals should have affirmed the order of the District Court denying a motion for a directed verdict.

6. The Circuit Court should have affirmed the verdict and judgment entered in the District Court on the basis, to-wit:

(a) That the company did not rely on the false statements contained in the application, or

(b) That the company was put on inquiry by its knowledge of the falsity of the application at the time it was passed upon it and did not have the right to rely upon the application but owed a duty to investigate further, or

(c) That the company did not sustain the burden of proof required by the Michigan statute, Sec. 12427 and 12444 Compiled Laws 1929, providing that unless fraud is shown, statements in the application are deemed representations and not warranties, and that no representation shall bar recovery under the policy of insurance unless made with the intent to deceive or unless it materially affected the acceptance of the risk or the hazard assumed, or

(d) That due to the admission of the company's underwriter that had the illnesses complained of been disclosed in the application, the risk would have been accepted, that the company suffered no prejudice by the false statements complained of, or

(e) That the false statements contained in the application were the conclusions of the company's medical examiner, or

(f) That the company was bound by the knowledge acquired by the medical examiner at the time the application was made and was estopped from raising the defense of false statements in application because of such knowledge.

V. Summary Of Argument.

1. Right of trial by jury.

2. Statutory provisions.

3. Burden of proof rests upon insurance company to show that it was prejudiced by false statements in the application.

4. Statements in application are conclusions of medical examiner and company is bound.

5. The company discovered that the representation complained of was false through knowledge of the 1926-1927 illness and it was its duty to pursue its opportunity to investigate to ascertain the truth or falsity of the representations in the application.

VI. Argument.

1. Right To Trial By Jury.

This court has repeatedly held that where the defense of fraud in the inducement of an insurance policy is available in an action at law, the mere fact that the defendant attaches to such defense a request that the policy be canceled does not give it the right to have the issue taken from a jury and tried by equity procedure. See *Clemmer v. Jefferson, S. L. I. Company, 9 F. Supp. 115; Enelow v. New York Life Insurance Company, 293 U. S. 386; Continental Casualty v. Yerxa, 16 F. (2d) 473; Griesa v. Mutual Life Insurance Company, 169 Fed. 509, Cert. Den. 215 U. S. 600. Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446,* cited in *2 Federal Rules Service, 38-a, 71* and in *131 A. L. R. 218,* holds that under the Federal Declaratory Judgment Act, and in a case such as the instant cause, there is an absolute right to a jury trial unless a jury has been waived and, further, that the entire case should be submitted to a jury. This decision is adopted by other circuits. See *Lumbermens Mutual Casualty Company v. Timms and Howard, Inc., 108 Fed. (2d) 497 (C. C. A. 2); United States F. & G. v. Koch, 102 Fed. (2d) 288 (C. C. A. 3); United States F.*

& G. Company v. Nauer, U. S. District Ct., d. Massachusetts 1/23/41, 4 Federal Rules Service, 38-a 71, case 1; Aetna Casualty and Surety Company v. Quarles, 92 Fed. (2d) 321 (C. C. A 4). As stated in the petition the position of the Sixth Circuit Court of Appeals is in conflict with all other circuits which have decided this matter.

2. Statutory Provisions.

There are two statutes involved where the issue of false statements in the application is raised, such statutes being as follows:

Michigan Compiled Laws 1929, Sec. 12427:

> "All statements made by the insured, shall, in the absence of fraud, be deemed representations and not warranties."

Michigan Compiled Laws 1929, Sec. 12444:

> "The falsity of any statement in the application for any policy covered by this chapter shall not bar the right to recovery under the policy unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insured."

The Michigan Supreme Court held, in *Schaefer v. Peninsula Insurance Company, 266 Mich. 386,* that the above statute puts upon the insurance company not only the burden of proving the falsity of statement but intent to deceive or other specified material results injurious to

the insurer. In *Gordon v. St. Paul Fire and Marine Insurance Company, 197 Mich. 226,* involving a similar statute, the court held that such legislature was not designed to make forfeitures more available to insurance companies but was designed to curb the right tc declare forfeitures.

3. Burden Of Proof Rests Upon Insurance Company To Show That It Was Prejudiced By False Statements In the Application.

In the case of *Bernadich v. Bernadich, 287 Mich. 137,* involving an insurance policy, the court cited with approval the case of *Francis v. London Guarantee and Accident Company, 100 Vt. 425, 138 Atl. 780,* which held as follows:

> "To sustain a defense of fraud because of misrepresentation or false statements in an insurance contract, it must be shown that the insurer was prejudiced or damaged by such conduct."

The underwriter in the case at hand admitted that if the illnesses complained of had been disclosed in the application, the company would have accepted the risk (R. 177-178).

4. Statements In Application Are Conclusions Of Medical Examiner and Company Is Bound.

Proofs were submitted showing applicant answered orally all questions made by the company's medical examiner who completed the application with his own con-

clusions and that the applicant signed the application without ascertaining the contents thereof (R. 89-95). See *Joyce Law of Insurance, 2d Edition, Section 474-a,* holding that an insurance company is estopped to question the truth of answers in an application where they are made by its own medical examiner who deduces the answers from facts correctly stated to him by the applicant. See also, *Couch, Encyclopedia of Insurance Law, Vol. 2, Section 511, pages 1462-3.*

5. The Company Discovered That the Representation Complained Of Was False Through Knowledge Of the 1926-1927 Illness and It Was Its Duty To Pursue Its Opportunity To Investigate To Ascertain the Truth Or Falsity Of the Representations In the Application.

The underwriter of the company admitted he had knowledge of the 1926 illness at the time he passed upon the application (R. 74). See *61 A. L. R. page 513,* under the subject of "Fraud-Opportunity to Ascertain Facts," Chapter III, entitled "Effect of Warning or Suspicious Circumstances," holding that one may not rely upon representations which would have been shown to be false by an investigation where it discovers that other representations in the same transaction were false. See, also, *Gratz v. Schuler, 25 Cal. App. 117, 142 Pac. 899; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88.*

Petitioner contends the underwriter should have contacted the applicant or checked its own records, which should have disclosed the full medical history according to proofs submitted.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous as a matter of law and, being in conflict with the decisions of this court and the decisions of other circuits, this error should warrant this court in granting certiorari in the instant case.

Respectfully submitted,

ARTHUR J. ABBOTT,
Attorney for Petitioner.

Dated June 7, 1941.

(16)

FILED
JUL 18 1941
CHARLES ELMORE CROPLEY
CLERK

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GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 157.

BERNICE VINCE,

Petitioner,

vs.

GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the 6th Circuit is officially reported in 118 F. (2d) 232. No rehearing was sought in the Court of Appeals (R. 206-213).

STATEMENT.

Respondent filed its complaint in the District Court for a declaratory judgment pursuant to the Federal Declaratory Judgment Act (28 U. S. C. A. 400), to have adjudicated the rights between it and petitioner and one Thomas G. Andris (an assignee of part of petitioner's rights which were released in the course of the trial), growing out of a life insurance policy issued by respondent to William A. Vince, husband of petitioner, on April 29, 1937, in the amount of $6,000.00. Petitioner answered and filed a counterclaim to recover the policy proceeds. Petitioner demanded a trial by jury and a jury trial was allowed on all issues. Respondent moved for a directed verdict at the close of all the evidence on all issues under both the complaint and the counterclaim (R. 137), and after verdict and judgment against it on those issues moved for judgment notwithstanding the verdict or in the alternative for a new trial (R. 158-159). All of these motions were denied and respondent appealed. On appeal the judgment was reversed and the case remanded with directions to grant the motion n.o.v. and to enter a decree or judgment declaring the policy null and void.

The complaint was bottomed upon representations made by Vince in his application for the policy consisting of representations, (1) that he had not received treatment in any hospital, sanitarium or asylum, (2) had never suffered from any disorder of the respiratory system such as pneumonia, asthma, bronchitis, chronic cough, tuberculosis, spitting of blood, etc., and (3) had not within the previous seven years consulted with any physician other than one named as having been consulted in connection with an earlier tonsilectomy (R. 3-4). After claim to the policy proceeds was made upon the death of Vince

on March 14, 1938, respondent discovered facts showing these representations to have been false and thereupon declared the policy void *ab initio* (R. 9, 84-85). The theory was that the misrepresentations voided the policy because they (1) were made with actual intent to deceive, (2) materially affected the acceptance of the risk, and (3) materially affected the hazard assumed by insurer (R. 8).

Vince had had the policy in his possession with a photostat of the application appended for approximately eleven months before his death (R. 70). It was shown that the above mentioned representations were false because of circumstances surrounding diseases suffered by Vince on two different occasions, one being a serious attack of pneumonia in 1926-27 and the other being a serious case of respiratory ailment during the winter of 1931-32. No information in respect of these illnesses was disclosed in the application. Preliminary to issuance of the policy respondent's underwriter had information apart from information received from Vince that Vince had suffered from pneumonia in 1926-27 but this information went no farther than to indicate that the pneumonia suffered at that time was simple in nature and short in duration (R. 70, 73, 74). Respondent later discovered that this illness had been serious (so alleged in the complaint, R. 7—not denied by the answers, R. 14). It had no information of the existence or extent of the 1931-32 illness (R. 70, 82, 84). Admissions in the answers were relied upon to establish the facts respecting the 1926-27 illness, and the evidence adduced established the facts surrounding the 1931-32 illness.

It was shown by uncontradicted evidence that the course of the 1931-32 illness was briefly as follows: Vince took sick in Philadelphia, where he was taken to a hos-

pital and consulted with two physicians (R. 54). Thereafter he entrained for Jackson, Michigan, in a collapsed condition (R. 54, 64). He was underweight, nervous, apprehensive (R. 63), and spat blood (R. 104). He was placed under intensive treatment consisting of diathermy and ultraviolet ray, was given tonic medication (R. 63) and put to bed (R. 104). He was treated by or consulted with doctors in Jackson, and Chicago (R. 45-52, 60, 63). His ailment was that of a lung involvement, lung abscess and cavity under the 7th and 8th ribs on the left side, infection of the hilus glands, bilateral bronchiectasis (R. 45, 47, 51, 60). He remained away from work and suffered continuous disability for nine months during which time disability benefits were paid by International Harvester Company (R. 53-58). His subsequent death was due to lung abscess under the 7th and 8th ribs on the left side (R. 123), and attending infections. Respondent's theory was that the cause of death was immaterial under the issues except as the circumstances surrounding the event bore upon the seriousness of the illness of 1931-32, and the District Court so charged the jury (R. 151, 152; see point (f) Pet. 5).

ARGUMENT.

I.

The petition shows no valid reason for granting certiorari.

A. *Jury Trial.* Petitioner demanded and had in the District Court a trial by jury on all issues (see Pet. 3). The trial was conducted in all respects in the manner of a jury trial, including the reception of evidence, the usual motions, customary jury instructions, rendition of verdict and judgment thereon. The issues under the complaint and counterclaim were identical and no distinction was made between them either in the District Court or in the Circuit Court of Appeals. The complaint was bottomed upon misrepresentations in the application and the defense to the counterclaim was the same. Contrary to the inference in the petition (pp. 6-7) this element of fraud in the inducement for the policy was dealt with as in an action at law and tried to a jury. The Court of Appeals not only approved of the method of trial in the District Court but held that a trial by jury was there required. The proper granting of a motion n.o.v. is not a denial of a trial by jury. The statement in the petition (pp. 5-6) that the Court of Appeals ruled that only the issues raised by the counterclaim should have been submitted to the jury is challenged, and is, it is submitted, due to misinterpretation of the opinion. The opinion is further criticised because of the statement that the triable issues of fact should have been submitted to the jury upon special interrogatories for the guidance of the court in adjudication of the declaratory relief prayed.

This criticism is unwarranted since interrogatories are provided for under the Declaratory Judgment Act. 28 U. S. C. A. 400 (3).

B. *Lack of Uniformity.* As to questions controlled by state law conflict among circuits is not of itself a reason for granting a writ of certiorari. *Ruhlin, et al.* v. *New York Life Ins. Co.* (1938), 304 U. S. 202; 58 Sup. Ct. Rep. 860, 862.

In the "argument" petitioner states (pp. 17-18) that the decision in the case of *Pacific Indemnity Co.* v. *McDonald* (C. C. A. 9), 107 F. (2d) 446, has been adopted by other circuits, citing in support of the statement decisions in the 2nd, 3rd and 4th circuits, and states that the 6th circuit is in conflict with all other circuits which have passed upon the point. In the "brief" petitioner states (p. 14) that the 6th circuit is not in uniformity with the 2nd, 3rd, 4th and 9th circuits. Thus petitioner contends that all circuits except the 6th are in accord on the law as found in the 9th circuit in the Pacific Indemnity case.

It is submitted that no disagreement between the 6th and 9th circuits is shown. Apparently petitioner relies solely upon an alleged variance between the opinion of the 6th circuit in the instant case and the decision in the 9th circuit in the Pacific Indemnity case to show the claimed lack of uniformity. It is submitted that there is no lack of uniformity between these opinions. In the Pacific Indemnity case the 9th circuit held (p. 448 of the report) that a declaratory judgment proceeding is neither legal nor equitable in nature and whether the issues involved shall be disposed of by a court or jury depends upon the setting in which the issues are framed. Issues ordinarily disposed of in actions at law may require a

trial by jury whereas issues usually disposed of in chancery proceedings will not require a jury trial. The Court of Appeals in the instant case in no manner disapproves of the principles announced in the Pacific Indemnity case nor of the principles in respect of declaratory judgment proceedings announced in any other case.

In commenting upon the Pacific Indemnity case the petition (p. 7) quotes from the opinion of the Court of Appeals in the instant case at a point where the writer of the opinion was addressing himself in comment upon the Pacific Indemnity case. In the quotation the sentence "This course was not disapproved" appearing at the end of the quotation is emphasized evidently to point out language supposedly giving rise to the alleged lack of uniformity. And later petitioner alleges (p. 15) the foregoing to be a misquotation contrary to applicable decisions of this court and of other courts. It is submitted that a reading of the opinion discloses that the emphasized last sentence is a statement that in the Pacific Indemnity case the reviewing court did not disapprove of the views of the District Court in which the case was tried, and that the sentence is in no sense an expression of dissent from the holding in the Pacific Indemnity case. It is denied that the petition shows any lack of uniformity or other reason for the granting of the writ of certiorari as required under rule 38, 5 (a) and (b).

II.

Petitioner's criticisms of decision of Circuit Court of Appeals are confused and unsound.

A. *Proceeding Neither Legal Nor Equitable.* In stating that the Court of Appeals apparently reviewed the case as a proceeding in equity (Pet. 8) there is an obvious

failure to recognize the character of proceedings under the Declaratory Judgment Act. The holding on appeal appears to be that the issues were set as in an action at law and therefore should have been so disposed of (as they were); and the proceeding not being equitable in nature, the equitable relief of cancellation could not be granted, but only a declaration as to the invalidity of the policy was permitted. A directed verdict for respondent necessarily had to be followed by a decree or judgment (which it should be called being unimportant) that the policy was null and void, being the final order contemplated by the Act.

B. *Alleged Misstatement of Petitioner's Position.* The claim (Pet. 8-9) that the Circuit Court of Appeals misstated petitioner's position in the trial and reviewing courts regarding false statements in the application appears to have no better premise than that the Court of Appeals failed to discuss in its opinion the points urged by petitioner. Their omission from the opinion is no indication that they went unnoticed but rather is it an indication of their unsoundness. No misstatement as such in the opinion is anywhere pointed out by the petition.

C. *Reliance on Application.* There is no sound basis in the record to support the allegation (Pet. 9, 15) that the Court of Appeals should have found that respondent did not rely on the statements in the application. The claimed basis for the allegation is that according to the admission of respondent's chief underwriter respondent would have accepted the risk if the illness complained of had been disclosed in the application (Pet. 3). This broad statement is largely untrue and decidedly misleading. In making the statement petitioner fails to dis-

tinguish between the 1926-27 illness and the 1931-32 illness and the reader is left to suppose that the alleged admission encompassed both illnesses. He is left to discover that in making the statement petitioner probably means to refer only to the 1926-27 illness. The statement is positively erroneous insofar as it encompasses any alleged admission respecting the 1931-32 illness and it is even without foundation as to the 1926-27 illness.

The underwriter in question did not testify that he would have accepted the risk if either of the illnesses complained of had been disclosed in the application. What he did testify to was that his information that the 1926-27 illness was a simple case of pneumonia of short duration did not deter him from accepting the risk (R. 70, 81, 82). He did not say that he would have accepted the risk had he known from disclosure in the application or from other sources that the 1926-27 illness was a serious case of pneumonia but on the contrary he testified that had he known of the seriousness of that illness he would not have accepted the application without further investigation (R. 70). As to the 1931-32 illness, the record discloses nothing but positive testimony of the chief underwriter that he would not under any circumstances have accepted the application without further investigation had he had information respecting that illness (R. 70-71).

The positive testimony of the underwriter is that there was no provision or statement in Part II of the application containing the questions and answers on the prior condition of health of the applicant upon which he did not rely in passing upon the application and in issuing the policy (R. 69-70). It goes without saying that respondent was prejudiced by its reliance upon the truth of the application (see Pet. 19). Any claim that re-

spondent did not rely upon the statements in the application or that it was not prejudiced by so doing finds no support in the record.

D. *Duty to Investigate Further.* It is asserted that respondent having knowledge showing an inconsequential illness was charged with a duty to make an independent investigation (Pet. 15). The assertion fails to take into consideration the nature of insurance contracts. Respondent was not required to approach consideration of the application with suspicion that the applicant was trying to defraud it; nor was the applicant permitted to withhold information and charge respondent with the obligation of discovering it from other sources. It had a right to rely upon the statements in the application and the fact that there was an omission in the application of reference to the 1926-27 illness, which according to respondent's information was not serious, was not calculated to arouse any suspicion on respondent's part because an omission of an illness of passing consequences is nothing unusual. Insurance policies are contracts *uberrimae fidei* and respondent had the right to believe that all facts material to its acceptance of the application or the risk were properly disclosed in the application. *Stipcich* v. *Metropolitan Life Ins. Co.* (1928), 277 U. S. 31, 48 S. Ct. 512, 72 L. Ed. 895.

The applicant was required to disclose any facts peculiarly within his knowledge. 26 Corpus Juris, Sec. 14 (c) p. 1071; Sec. 18 ee. p. 1076; Sec. 19 ff. p. 1078.

Furthermore, as pointed out in the opinion on appeal, there is clear authority in the Michigan decisions that even its own earlier records do not put the insurer upon notice of the falseness of statements in the application

unless there is some circumstance that directs attention to them.

Brown v. *Metropolitan Life Ins. Co.* (1887), 65 Mich. 306, 314; 32 N. W. 610.

Rhode v. *Metropolitan Life Ins. Co.* (1901), 129 Mich,. 112; 88 N. W. 400; (1903) 132 Mich. 503; 93 N. W. 1076.

In *North American Life Assurance Co.* v. *Jones, Admx.* (1939), 287 Mich. 298; 283 N. W. 587, the beneficiary contended in a proceeding to cancel a policy that insurer was a member of a Recording and Statistical bureau to which reports are submitted by insurers concerning applicants for insurance and in the opinion a lengthy resume of information which insurer had before it from this bureau at the time it issued the policy was quoted. Defendant asserted that this information had put insurer on notice of heart trouble affecting its insured but the court held to the contrary and remarked that while the record revealed a knowledge of insured's condition in certain respects, still there was nothing in the record indicating any knowledge on the part of plaintiff at the time of issuing the policy that insured had repeatedly consulted physicians nor that plaintiff had reason to suspect a heart condition. The information which might have demanded further investigation was far more extensive and significant than the bare information of the 1926-27 simple pneumonia in the instant case, yet cancellation was not denied for lack of further investigation. Respondent had no information through exchange of information or otherwise of the more serious illness of 1931-32.

E. *Burden of Proof.* Contrary to the allegation in the petition (p. 10) respondent fully maintained its burden of proof. No substantial instance is pointed out in the petition where respondent failed to maintain the burden

of proof. The application for the insurance received in evidence (R. 37-44) proved that the statements relied upon were in fact made and under Michigan decisions the beneficiary was estopped to deny that those statements were made.

Metropolitan Life Ins. Co. v. *Freedman* (1909), 159 Mich. 114, 116; 123 N. W. 547.

Bonewell v. *North American Accident Ins. Co.* (1911), 167 Mich. 274, 276; 132 N. W. 1067.

Mutual Life Ins. Co. v. *Geleynse* (1928), 241 Mich. 659; 217 N. W. 790.

Henson v. *John Hancock Mutual Life Ins. Co.* (1933), 261 Mich. 693; 247 N. W. 102.

Metropolitan Life Ins. Co. v. *Jankowski* (1938), 285 Mich. 291; 280 N. W. 766.

Respondent proved the statements to be false because of the 1926-27 illness and particularly because of the 1931-32 illness and the hospitalization and consultations with and treatments by physicians in connection therewith. This proof with the accompanying element of seriousness was never controverted by evidence but on the contrary stands unchallenged by the record. The burden was on petitioner to show the illnesses were not serious and this petitioner wholly failed to do.

Rhode v. *Metropolitan Life Ins. Co.* (1901), 129 Mich. 112, 88 N. W. 400, 401; (1903) 132 Mich. 503; 93 N. W. 1076.

Bullock v. *Mutual Life Ins. Co.* (1911), 166 Mich. 240; 131 N. W. 574.

Rickert v. *Travelers Ins. Co.* (1937), 282 Mich. 538, 545; 276 N. W. 546.

Under the Michigan statute the policy here involved was void *ab initio* if the false answers contained in the application were made with (1) intent to deceive, or (2) were in respect of matters either material to the ac-

ceptance of the risk, or (3) to the hazard assumed. The statute (incorrectly quoted in the petition, p. 18) is as follows:

> "False statements in application; effect. Sec. 17. The falsity of any statement in the application for any policy covered by this chapter shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. (C. L. '29, Sec. 12444)."

17 Mich. Stats. Anno. Sec. 24.280, pp. 556-7.

Krajewski v. *Western and Southern Life Ins. Co.* (1928), 241 Mich. 396, 402; 217 N. W. 62.

Under Michigan law information surrounding a serious illness is material to the acceptance of the risk and to the hazard to be assumed.

Brown v. *Metropolitan Life Ins. Co.* (1887), 65 Mich. 306, 313; 32 N. W. 610.

Mutual Life Ins. Co. v. *Geleynse* (1928), 241 Mich. 659, 663; 217 N. W. 790.

Rhode v. *Metropolitan Life Ins. Co.* (1901), 129 Mich. 112; 88 N. W. 400, 401; (1903) 132 Mich. 503; 93 N. W. 1076.

See also: *Equitable Life Assurance Society of United States* v. *Strasberg* (Ind. 1938), 14 N. E. (2d) 703, 704.

Metropolitan Life Ins. Co. v. *Becraft* (Ind. 1938), 12 N. E. (2d) 952.

F. *Medical Examiner's Information.* Petitioner states that applicant informed respondent's medical examiner of disorders complained of at the time of making application (Pet. 5). Because of the breadth of this statement it is untrue. Petitioner offered testimony of Thomas G. Andris that he was present at the time respondent's medical examiner examined the applicant. He purported to remember without reference to any record the answers Vince supposedly made to some thirty odd questions put

more than two years previously by the medical examiner (R. 92). This witness testified that Vince told the medical examiner that he had had pneumonia at a prior time but that it was not of a serious nature (R. 90). This was the full extent of the testimony upon which petitioner bases the statement here dealt with (R. 90). Andris did not claim that Vince told the doctor that his troubles had involved a lung abscess or bronchiectasis, but simple pneumonia not of a serious nature was the only disclosure that he claimed was made. If we take this testimony at its full face value it did not in fact contradict the representations made in the application since a failure to disclose a fleeting illness would not necessarily amount to deception. The testimony of Andris' was admitted for its bearing only upon the question of intention to deceive and not for the purpose of contradicting the statements made in the application (R. 145-146). And the testimony in no sense rebutted the presumptive case of intention to deceive found in the failure of applicant to disclose that he had spat blood and had a lung abscess or cavity and bronchiectasis on a prior occasion.

G. *Intent to Deceive.* Silence in respect of these prior illnesses, consultations and treatments at the time the application was made and during the period the policy with a copy of the application attached was in his possession is persuasive proof of the applicant's fraudulent intent.

Lawrence v. *Conn. Mut. Life Ins. Co.* (C. C. A. 6, 1937), 91 Fed. (2d) 381, 384.

New York Life Ins. Co. v. *Cohen, et al.* (C. C. A. 6, 1932), 57 Fed. (2d) 494-495.

Ruggirello v. *Detroit Automobile Inter-Ins. Exchange* (1935), 272 Mich. 44; 260 N. W. 787.

Kane v. *Detroit Life Ins. Co.* (1918), 204 Mich. 357; 170 N. W. 35, 38.

Metropolitan Life Ins. Co. v. *Freedman* (1909), 159 Mich. 114; 123 N. W. 547, 548.

III.

The decision of the Circuit Court of Appeals is well founded on the law and the evidence.

The uncontradicted evidence shows that the representations complained of were made and that they were false in respects material to the acceptance of the risk and the hazard assumed; and that they were accompanied by intention to deceive. It also shows that respondent issued the policy in reliance upon those representations and after discovering their falsity elected to rescind *ab initio*. With such a record we submit only one result was fitting, being the result reached by the Circuit Court of Appeals.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

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